Nos. 81-150 and 81-546

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

v.

MARATHON PIPELINE COMPANY and
UNITED STATES OF AMERICA,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

MARATHON PIPELINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York (the "Committee"), *amicus curiae* by consent of the parties, respectfully submits this brief to address an issue of signal importance to the bar and to the administra-

tion of justice: the constitutionality of 28 U.S.C. § 1471(c), as enacted by the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 *et seq.* (the "Reform Act"), which permits bankruptcy courts to exercise jurisdiction of "all civil proceedings arising under title 11 or arising in or related to cases under title 11." *See* 28 U.S.C. §1471(b).[1]

We urge the Court (i) to reverse the holding below that the delegation of authority in § 1471(c) is an unconstitutional delegation of judicial power in violation of Article III of the Constitution; and (ii) to hold that § 1471(c) is a valid enactment under Congress' Article I powers.

QUESTION PRESENTED

Whether Congress has the power under Article I of the Constitution to delegate to the bankruptcy courts (composed of non-tenured judges whose compensation may be diminished) jurisdiction of all civil proceedings "arising in or related to" bankruptcy cases, as provided by 28 U.S.C. § 1471(c).

STATEMENT OF THE CASE

Proceedings Below

On January 14, 1980, Northern Pipeline Construction Co. ("Northern") filed a petition for reorganization in the United States Bankruptcy Court for the District of Min-

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[1] The Reform Act includes four titles. Title I contains the substantive bankruptcy law and is contained in 11 U.S.C § 101 *et seq.*; Title II amends 28 U.S.C. and establishes the new bankruptcy courts and grants them jurisdiction; Title III contains amendments to various federal statutes as they pertain to bankruptcy cases; and Title IV provides for the transition period before the effective date of the Reform Act: April 1, 1984.

nesota. On March 25, 1980, Northern filed a complaint in the bankruptcy court against Marathon Pipeline Company ("Marathon"), involving the same contract claims which Northern had asserted against Marathon in a pending, pre-bankruptcy action in the United States District Court for the Western District of Kentucky. Marathon moved in the bankruptcy court to dismiss Northern's complaint on the ground that the grant of jurisdiction in 28 U.S.C. § 1471(c) is unconstitutional. The bankruptcy court denied Marathon's motion.

On appeal, the district court dismissed Northern's complaint on the ground that § 1471(c) is an invalid delegation of Article III power to an Article I court. While recognizing that "in this area confusion abounds" (Jurisdictional Statement of the United States at 15a), the district court nevertheless held that bankruptcy cases are encompassed within the Article III judicial power and, accordingly, cannot be heard by Article I courts. *Id.* at 24a. The United States and Northern filed notices of appeal to this Court. Probable jurisdiction was noted on November 9, 1981.

Statute at Issue

The Court in this case is asked to review a detailed statutory scheme for the prompt and efficient disposition of the affairs of a debtor. Prior to October 1, 1979, the effective date of the Reform Act, bankruptcy cases were within the jurisdiction of the district court but were generally referred to the bankruptcy court, whose judges were appointed for 6-year terms by the district court. Section 34a of the Bankruptcy Act of 1898 (the "Act"), formerly 11 U.S.C. § 62a; Bankruptcy Rule 102. The jurisdiction of the bankruptcy court was limited to "summary jurisdiction" over controversies involving property in the actual or constructive possession of the debtor; however, in cases where

the defendant consented, or failed to assert an objection, to jurisdiction, the bankruptcy court had jurisdiction of actions involving property in the possession of third parties. Section 2a(7) of the Act, formerly 11 U.S.C. § 11a(7); *see generally,* 8 *Collier on Bankruptcy* § 311 (14th ed. 1978). A bankruptcy judge's order was appealable to the district court. Bankruptcy Rule 801.

Effective April 1, 1984, the Reform Act establishes a bankruptcy court in each judicial district as "an adjunct to the district court." 28 U.S.C. § 151. The judges of the new bankruptcy court are appointed to 14-year terms by the President, with the advice and consent of the Senate, and are subject to removal by the judicial council of the circuit for "incompetency, misconduct, neglect of duty, or a physical or mental disability." 28 U.S.C. §§ 152, 153.

The Reform Act establishes a transition period until April 1, 1984 during which the existing courts of bankruptcy continue to exist, but have the powers and utilize the procedures applicable after April 1, 1984. The terms of office of all existing bankruptcy judges are extended until March 31, 1984 or until their successors take office. Reform Act Title IV, §§ 404, 405.

The Reform Act eliminates the "summary" limitation on the bankruptcy court's jurisdiction and provides, instead, that the bankruptcy court shall have jurisdiction "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(c).[2] In

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[2] 28 U.S.C. § 1471, in pertinent part, provides:

"(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the

(footnote continued on following page)

such cases, the bankruptcy court "shall have the powers of a court of equity, law and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. § 1481.

The Reform Act provides three possible appeals from a bankruptcy court. If the circuit council has designated a panel of three bankruptcy judges to hear appeals, the panel can hear appeals from final orders of a bankruptcy court and, with leave of the panel, from interlocutory orders. 28 U.S.C. §§ 160, 1482. If no appeals panel is designated, the district court exercises appellate jurisdiction. 28 U.S.C. § 1334. Finally, if the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. § 1293(b). The court of appeals has jurisdiction of appeals from either the district court or from the appellate panel. 28 U.S.C. § 1293.

INTEREST OF *AMICUS CURIAE*

The jurisdiction of the bankruptcy courts is an issue of enormous importance to the Committee, whose members are frequently involved in corporate reorganization proceedings and who, therefore, have a very special and particular interest in the effective administration of debtors' estates. Moreover, the recent overwhelming increase in business bankruptcies renders the prompt and expeditious processing of reorganization cases even more important, not only to

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(footnote continued from preceding page)

district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts."

the immediate parties involved, but also to all of the other persons and businesses whose welfare is economically interwoven with the welfare of a corporate debtor.[3]

It is the Committee's view that the jurisdictional grant in 28 U.S.C. § 1471(c) is an essential element of the overall reform effected by the Reform Act. In order to maximize the prospects for reorganization of a debtor, it is necessary to give bankruptcy courts the power to resolve all disputes affecting the debtor in one forum, thus avoiding the inevitable delay and diminution in the debtor's assets caused by litigation in numerous jurisdictions as well as litigation over the bankruptcy court's jurisdiction. While the Committee originally supported the granting of Article III status to bankruptcy courts,[4] it is the Committee's position that the present grant of jurisdiction is both necessary and proper in order to satisfy the particularized needs of this specialized area.

SUMMARY OF ARGUMENT

The Committee submits that affirmance of the decision below would seriously compromise important public policies concerning the efficient and effective administration of debtors' estates, without at the same time advancing the policies underlying Article III. The subtleties of the distinctions between Article I and Article III judicial power are issues which have been a source of consternation to

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[3] During the twelve month period ending June 30, 1981, the number of business bankruptcies was 66,006, as compared to 45,857 in the prior twelve months and 29,500 for the twelve month period ending June 30, 1979. Annual Report of the Director of the Administrative Office of the United States Courts 10 (1981) [hereafter 1981 AO Report].

[4] The Committee's position was expressed in a Report on S.2266, *reprinted in* 1977 Senate Hearings, *infra* n.6, at 1267, 1269.

numerous constitutional scholars as well as to the members of this Court. *Compare, e.g., Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929) with *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).[5]

In this brief, the Committee focuses on the constitutional issues as they relate to the practical considerations which compelled Congress to enact the comprehensive reform of the bankruptcy laws embodied in the Reform Act. We respectfully submit that the unification of jurisdiction over bankruptcy cases and related civil proceedings reflected in 28 U.S.C. § 1471(c) is a valid exercise of Congress' Article I power for the following reasons:

First, this Court has consistently held that all cases within the judicial power of the United States need not be tried in Article III courts, and that Congress has the power to establish Article I courts to adjudicate with respect to "specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States*, 411 U.S. 389, 407-08 (1973). This case presents precisely the type of area in which such distinctive treatment is warranted. The grant of jurisdiction in 28 U.S.C. § 1471(c) is an essential provision of the pervasive bankruptcy reform which resulted from years of careful study and analysis by both Houses of Congress.[6] It is based upon the following Congressional findings:

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[5] As Justice Harlan noted in *Glidden*: The "abstractness" of the issues is "graphically demonstrated" by the fact that the record on appeal was 66 pages while the briefs extended to 533 pages exclusive of appendices. 370 U.S. at 534 n.7.

[6] Congress' deliberations concerning a revision of the bankruptcy laws fill 17 volumes. *See* A. Resnick and E. Wypyski, *Bankruptcy Reform Act of 1978: A Legislative History* (1979). The deliberations span ten years—from creation of the Commission to Study the Bankruptcy Laws of the United States to passage of the Reform Act. *See*:

(footnote continued on following page)

1. A crisis existed in the bankruptcy court system because of the increase in the volume of cases;

2. The district courts could not handle the bankruptcy caseload because of their own existing caseloads and the priority accorded other litigation;

3. Cases involving debtors could not effectively be relegated to state courts;

4. The efficient administration of bankruptcy cases required that bankruptcy courts be presided over by specialists; and

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Bankruptcy Act Revision, Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. (1975) [hereafter 1975 House Hearings];

Bankruptcy Reform Act, Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary, Part I, 94th Cong. 1st Sess. (1975) [hereafter 1975 Senate Hearings];

Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary, 95th Cong. 1st Sess. (1977) [hereafter 1977 Senate Hearings].

Before floor consideration, the House conducted 35 days of hearings and heard over 100 witnesses. H. Rep. No. 95-595, 95th Cong. 1st Sess. 2 (1977) [hereafter 1977 House Report].

After initial floor consideration, the House held an additional three days of hearings. *See Bankruptcy Court Revision,* Hearings on H.R. 8200 Before the Subcomm. on Civil & Const. Rights of the House Comm. on Judiciary, 95th Cong. 1st Sess. (1977) [hereafter 1977 House Hearings].

The Senate held 24 days of hearings as well, with over 60 witnesses. S. Rep. No. 95-989, 95th Cong. 2d Sess. 2 (1978) [hereafter 1978 Senate Report].

The issue of the constitutionality of the bankruptcy court was addressed in the Report on Constitutional Bankruptcy Courts (Comm. Print No. 3) of the Staff of the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 95th Cong. 1st Sess. (1977).

5. There was a compelling need to enlarge the jurisdiction of the bankruptcy courts to include all proceedings involving a debtor.

In order to meet the specialized needs in the bankruptcy area, Congress created Article I courts, but limited the courts' injunctive and contempt powers and provided for review by Article III courts. Thus, the jurisdictional grant of 28 U.S.C. § 1471(c) falls clearly within Congress' Article I power to establish uniform laws on the subject of bankruptcies and yet avoids constitutional infirmity.

Second, the jurisdiction granted in 28 U.S.C. § 1471(c) of civil proceedings arising in or related to debtor cases was available to bankruptcy courts under the Bankruptcy Act where the defendant consented. The only change in the law, then, is the elimination of the requirement of consent. This change is not constitutionally significant because, as this Court has recognized, subject matter jurisdiction cannot be conferred by consent. *Mitchell* v. *Maurer,* 293 U.S. 237, 244 (1934). The jurisdiction formerly exercised by the bankruptcy court is presumptively constitutional and, since the Reform Act does not effect a constitutionally significant change in the subject matter jurisdiction of the bankruptcy court, the present statute must also be constitutional.

Third, the Article III concern with protecting the judiciary from undue legislative and executive pressure is carefully respected under the Reform Act. Indeed, in terms of removal provisions, the bankruptcy judges are even more insulated from legislative influence than are Article III judges, since Congress has the power to impeach Article III judges whereas bankruptcy judges can only be removed during their 14-year terms by the judicial council.

ARGUMENT

I.

Congress Has the Power to Establish Article I Courts With Plenary Jurisdiction Over Bankruptcy Cases.

It is fundamental that all cases within the "judicial power of the United States" need not be tried in courts whose judges are tenured and protected from salary reduction. Indeed, even though Article III, section 2, of the Constitution provides that the judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States," Congress is under no compulsion to vest any particular subject matter jurisdiction in Article III trial courts. *E.g., Stevenson* v. *Fain*, 195 U.S. 165, 167 (1904); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922).[7]

In 1856 this Court wrote:

> "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

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[7] Article III, section 1 of the Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article I, section 8, of the Constitution gives Congress the power "To constitute Tribunals inferior to the supreme Court."

See also, Crowell v. *Benson,* 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

Thus, for example, until the Act of March 3, 1875, c. 137, 18 Stat. 470, Congress did not extend the jurisdiction of federal trial courts to "cases arising under the laws of the United States." Prior to that time, certain federal question cases had been litigated exclusively in non-Article III, state tribunals. Even today, non-tenured, non-Article III state court judges have concurrent jurisdiction to determine almost all federal claims and claims involving diversity as well as exclusive diversity jurisdiction where the amount in controversy is less than $10,000. *See Testa* v. *Katt,* 330 U.S. 386 (1947); *Douglas* v. *New York, New Haven & Hartford R. Co.,* 279 U.S. 377 (1929); *Engel* v. *Davenport,* 271 U.S. 33 (1926); 28 U.S.C. § 1332.

Moreover, this Court has consistently held that Congress has the power to establish Article I courts to adjudicate with respect to specialized areas. *E.g., American Insurance Co.* v. *Canter,* 26 U.S. (1 Pet.) 511 (1828) (territorial admiralty courts); *In re Ross,* 140 U.S. 453 (1891) (consular courts); *United States* v. *Coe,* 155 U.S. 76 (1894) (Court of Private Land Claims); *Ex Parte Bakelite,* 279 U.S. 438 (1929) (Court of Customs and Patent Appeals); *Toth* v. *Quarles,* 350 U.S. 11 (1955) (military courts).

Indeed, this Court has recognized that bankruptcy is a specialized area subject to non-Article III treatment pursuant to Congress' Article I power. For example, in *Schumacher* v. *Beeler,* 293 U.S. 367, 374 (1934), this Court wrote:

> *"The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction* to entertain [suits between trusteees and adverse claimants], and could prescribe the condi-

tions upon which the federal courts should have jurisdiction." (Emphasis added.)

And in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox*, 264 U.S. 426, 430-31 (1924), this Court wrote:

> "*Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount.* Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is." (Emphasis added.)[8]

Two cases in particular have focused on specialized tribunals established under Congress' Article I power. In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court upheld the power of untenured federal commissioners to determine private rights arising under the Longshoremen's and Harbor Workers' Compensation Act, subject to Article III review on issues of law. In referring to Congress' enactment of a statute for the making of compensation awards to employees, this Court wrote:

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[8] In *United States* v. *Kras*, 409 U.S. 434, 447 (1973), a case holding bankruptcy filing fees constitutional, this Court wrote:

> "The mere fact that Congress has delegated to the District Court supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to a court. Then, too, *Congress might have delegated the responsibility to an administrative agency.*
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> * * *
>
> The rational basis for the fee requirement is readily apparent. *Congressional power over bankruptcy, of course, is plenary and exclusive.*" (Emphasis added.)

> "For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law." (285 U.S. at 54.)

Similarly, in *Palmore* v. *United States,* 411 U.S. 389, 407-08 (1973), this Court wrote:

> "It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that *the requirements of Art. III,* which are applicable where laws of national applicability and affairs of national concern are at stake, *must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.*" (Emphasis added.)

Palmore held that Congress, under its Article I power to legislate for the District of Columbia, may provide for local criminal trials before judges who are not accorded life tenure and protection against salary reduction. In holding that the District of Columbia Court Reform and Criminal Procedure Act of 1970 was valid legislation with respect to a "specialized" area "having particularized needs

and warranting distinctive treatment," this Court relied upon the legislative history of the Act which indicated the following:

First, Congress had recognized, from its own studies, that there was a crisis in the District of Columbia judicial system because caseloads had become unmanageable for the existing courts.

Second, Congress had determined, after careful consideration, that a local court system staffed by judges without lifetime tenure was more workable and efficient than an Article III court. *Id.*, 411 U.S. at 408-09.

The case at bar presents another instance in which the legislative history reveals Congressional response to a need to legislate with respect to a "specialized" area "having particularized needs and warranting distinctive treatment." Jurisdiction under 28 U.S.C. § 1471(c) was established pursuant to Congress' Article 1, section 8, clause 4, power to "establish . . . uniform laws on the subject of Bankruptcies throughout the United States," and was found by Congress to be necessary and proper because of the following factors:

First, Congress had concluded, as in *Palmore*, that there was a crisis in the bankruptcy court system because of the volume of cases:

> "The number of people and dollar amounts involved in bankruptcy cases are staggering. As of October 1976, there were pending in the bankruptcy courts 250,000 cases, involving 250,000 debtors. In those cases, there were over 9 million scheduled creditors; over $27 billion in scheduled assets; and nearly $43 billion in scheduled liabilities. Bankruptcy judges deal daily with issues that involve millions of dollars, and frequently dozens or hundreds of jobs of em-

> ployees of struggling companies." (1977 House Report at 11; footnote omitted.)[9]

Second, Congress had concluded, as in *Palmore*, that the increased bankruptcy caseload could not be handled by the district courts:

> "The district courts are generally overburdened. Their caseload has increased dramatically in recent years without a corresponding increase in the number of judges. . . .
>
> . . . the Speedy Trial Act requires that criminal matters be given precedence on the district court calendars. The Constitution does not require a 'speedy trial' for bankruptcy matters as it does for criminal cases. Thus, criminal matters would continue to be accorded priority. However, the nature of bankruptcy is such that it, too, for practical reasons, requires expeditious disposition." (1977 House Report at 14; footnote omitted.)[10]

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[9] The number of bankruptcy filings continues to rise. More than half a million cases were filed in the year ending June 30, 1981, double the amount for 1977-78. 1981 AO Report, *supra* note 3, at 8.

[10] This Court has long recognized the special need for rapid disposition of bankruptcy cases. *E.g., Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) ("a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period' ") (*quoting Ex Parte Christy*, 44 U.S. (3 How.) 292, 311 (1845)). This concern for speedy adjudication is amply reflected in Congressional Hearings. *E.g.*, 1977 House Hearings at 161 n.1 (Testimony of Judge Cyr) ("delay effectively diminishes or extinguishes the res in litigation." There is a "need for prompt disposition of bankruptcy litigation which cannot be accommodated within the framework of courts of general jurisdiction along with their other civil and criminal litigation"); and 205; 1975 Senate Hearings at 35, 117.

United States District Court Judge King testified that, in addition to the Speedy Trial Act, 32 other kinds of cases are also accorded priority over bankruptcy cases. 1977 Senate Hearings at 417. Bank-

(footnote continued on following page)

Third, Congress had concluded that relegating cases involving a debtor to state courts would significantly impair the administration of debtors' estates. *See* 1977 House Report at 45. As Bankruptcy Judge Copenhaver testified:

> "What happens . . . is that many cases which ought to be heard, and would be heard in the bankruptcy court, hearing them expeditiously so that the entire estate might be closed promptly, are allowed to linger on the State court calendar for years and years without action. Frequently the State courts are not as interested in disposing of these matters as is the bankruptcy court.
>
> The State court is not charged with the duty of seeing to the prompt administration of the estate, whereas the bankruptcy court is, so that very often those cases are allowed to languish without action for a considerable period of time. The result is that many disputes, whether to recover accounts receivable or otherwise, and which ought to be heard with promptness within the framework of a single court sitting in bankruptcy, are either settled by the trustee for a pittance, or they are abandoned entirely rather than risk the costly delay to which that litigation is usually subjected in a nonbankruptcy forum, which so often is lacking in enthusiasm for bankruptcy cases in particular, and the complexity and apparent novelty of bankruptcy disputes in general." (1975 House Hearings at 145.)

Fourth, Congress concluded that bankruptcy courts should be presided over by bankruptcy specialists:

(footnote continued from preceding page)

ruptcy Judge Kline testified that district court judges face "impossible pressures." 1977 Senate Hearings at 439. The situation is even worse today. Civil case filings are up over 30% since 1978 and the number of civil filings per authorized judgeship has also risen since 1978. 1981 AO Report, *supra* note 3, at 56, 59.

> ". . . bankruptcy judges today comprise a de facto specialized court system within the district courts . . . . Approximately 190 full-time and 30 part-time bankruptcy judges throughout the country handle the approximately 250,000 cases now pending in the courts with little direct supervision from the district judges.
>
> As the system has evolved, district judges have removed themselves further and further from the consideration of bankruptcy matters. The area has become too specialized and requires too much expertise to be able to be handled on an ad hoc basis by a generalist." (1977 House Report at 9.)[11]

Fifth, Congress found that there was a compelling need to enlarge the jurisdiction of the bankruptcy courts to include all cases involving the debtor:

> "A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have

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[11] In providing for adjudication by specialists, Congress evidenced a "practical concern for accurate results," which Justice Blackmun has called "the focus of the Due Process Clause" in the Article III context. *United States* v. *Raddatz*, 447 U.S. 667, 684 (1980) (Blackmun, J., concurring).

> embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with a plenary action in either the U.S. district court or an appropriate state court to try issues already substantially tried in the summary proceedings before the bankruptcy court. Frequently, the liquidation of bankrupt estates and the rehabilitation of debtors are significantly prejudiced thereby." (1978 Senate Report at 17-18.)[12]

Originally, the House bill provided for an Article III bankruptcy court separate and independent from the district court. Title 28 § 151 under H.R. 8200. The proposal of an independent court received overwhelming support:

> "The Commission on the Bankruptcy Laws proposed it. The National Bankruptcy Conference testified in support of the proposition. The Commercial Law League of America and the American Bankers Association urged the Subcommittee to create an independent court system. Finally, the American Bar Association, at its 1976 meeting, and the Association of the Bar of the City of New York have called for the creation of an independent bankruptcy court.

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[12] Numerous witnesses opposed retention of the summary-plenary distinction. *E.g.*, 1975 House Hearings at 179, 539, 1044; 1975 Senate Hearings at 35, 125; 1977 Senate Hearings at 832; 1977 House Hearings at 161, 217, 239, 241-42, 254; 1977 House Report at 45 n.27.

> During 35 days of hearings in the House and 20 days in the Senate, not one witness reached the conclusion that the present bankruptcy court system should be retained." (1977 House Report at 18; footnotes omitted.)

In spite of its widespread support, there was intense opposition to the creation of an Article III bankruptcy court based, in part, upon the expense associated with tenured judges.[13] As a result of this opposition, Congress, pursuant to its Article I power to establish uniform laws of bankruptcy, fashioned a compromise bill which, as in *Palmore,* benefits from the economy of utilizing non-tenured judges to meet "specialized" needs and yet preserves Article III protections.[14]

As enacted, the Reform Act creates the bankruptcy court as an adjunct to the district court (28 U.S.C. § 151) and limits the power of the bankruptcy court by providing that it "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28

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[13] *See, e.g.,* 123 Cong. Rec. H 11706-07 (daily ed. Oct. 27, 1977); 123 Cong. Rec. H 11767-68 (daily ed. Oct. 28, 1977); 1977 House Hearings at 8, 67, 128 and 219.

[14] The volume of bankruptcy cases fluctuates from year to year. For example, from 1975 to 1978 the number of bankruptcy filings declined by a fifth; from 1979 to 1980, it increased by nearly three-fifths. See 1981 AO Report, *supra* note 3, at 8. Had Congress created an Article III bankruptcy court, it would have undertaken an obligation to support a fixed number of bankruptcy judges regardless of any reduction in the need for such judges in the future.

For an account of the legislative history of H. R. 8200, *see* Clarkson, *A Brief Overview of the Congressional Debate on the Bankruptcy Court System,* Annual Survey of Bankruptcy Law 63 (1979); Klee, *A Legislative History of the New Bankruptcy Law,* 28 De Paul Law Review 941 (1979).

U.S.C. § 1481.[15] In addition, the Reform Act assures constitutionality by providing for review by an Article III tribunal. 28 U.S.C. §§ 1293 and 1334. *See Crowell* v. *Benson*, 285 U.S. 22 (1932). Thus, the Reform Act reflects recognition of the constitutional limitations on Article I courts and imposes restrictions on the powers of the bankruptcy court to conform to those limitations. As stated in the Senate Report on the compromise bill:

> "The expanded jurisdiction vested in the U.S. district courts may be delegated by statute for exercise exclusively by bankruptcy judges, subject always to review, as under present law, by the district courts. Certain perceived constitutional impediments to the exercise of the judicial power of the United States by non-tenured judges are thus eliminated." (1978 Senate Report at 16; footnote omitted.)

The testimony of Third Circuit Judge Ruggero J. Aldisert was persuasive on the issue of the constitutionality of an Article I bankruptcy court with expanded jurisdiction. Judge Aldisert stated:

> ". . . when it came to the question, not as to a decision as to whether there should be an Article III judge or another type of judge, but strictly from the jurisprudential standpoint, from the standpoint of the constitutionality of the bankruptcy judge assuming increased powers, there was unanimity in [the Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference] and there was unanimity

[15] These limitations on the power of an Article I bankruptcy court were suggested by various constitutional scholars whose opinions were solicited by the Hon. Peter W. Rodino, Jr., Chairman of the House Comm. on the Judiciary. *See* 1977 House Report at 63, 79, 84 and 86.

> in the Judicial Conference of the United States that Article III status was not necessary to assume that expanded jurisdiction. Circuit conferences consisting of every district and every circuit judge within a circuit, have concluded that an Article III judge is not necessary. The only circuit conferences that have not so concluded are the first circuit and the District of Columbia Circuit, because the question was not presented to them." (1977 Senate Hearings at 413-14.)[16]

The legislative history here, even more strongly than in *Palmore*, demonstrates the necessity for Article I courts empowered to adjudicate with respect to a "specialized" area "having particularized needs and warranting distinctive treatment." *Palmore, supra,* 411 U.S. at 408.

II.

The Change in Jurisdiction of the Bankruptcy Court From Prior Law Is Constitutionally Insignificant.

Under 28 U.S.C. § 1471(c), the bankruptcy court has jurisdiction of all civil proceedings arising in or related to debtor cases. Under the Bankruptcy Act, the bankruptcy court had this same jurisdiction where the defendant consented. Section 2a(7), formerly 11 U.S.C. § 11a(7). Hence, the only change under the Reform Act affecting the subject matter jurisdiction of the bankruptcy court is the removal of the requirement of consent to jurisdiction by a defendant. The removal of the requirement of consent, however, is not constitutionally significant because, as this Court has held:

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[16] Judge Aldisert's testimony related to §§ 201 and 202 of S.2266 pursuant to which the bankruptcy courts, to the extent authorized by rule or order of the district court, had jurisdiction to hear all "civil proceedings by or against" a debtor.

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties." (*Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934).

See also, California v. *LaRue*, 409 U.S. 109, 112-13 n.3 (1972); *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). Thus, the bankruptcy court under prior law had jurisdiction which was constitutionally equivalent to that granted in 28 U.S.C. § 1471(c).

Under the Bankruptcy Act of 1898, bankruptcy courts had summary jurisdiction of all actions to recover preferences, fraudulent transfers and other property of the debtor. Sections 60b, 67e, and 70e(3) of the Act, formerly 11 U.S.C. §§ 96b, 107e and 110e(3); *see Katchen* v. *Landy*, 382 U.S. 323 (1966); 8 *Collier on Bankruptcy* ¶ 3.01[2] (14th ed. 1978). In addition, bankruptcy courts had jurisdiction of other controversies where the defendant consented.

Section 2a(7), formerly 11 U.S.C. § 11a(7), provided that bankruptcy courts could exercise jurisdiction at law and in equity:

> " . . . *where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy,* by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse. . . ." (Emphasis added.)

Section 23, formerly 11 U.S.C. § 46, provided:

> "b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the

> bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, *unless by consent of the defendant,* except as provided in sections 60, 67 and 70 of the Act." (Emphasis added.)

This Court has expressly held that jurisdiction pursuant to Section 23 can be conferred by consent upon a non-Article III bankruptcy referee. *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932).[17] *MacDonald* involved the jurisdiction of the bankruptcy referee to hear an action for the recovery of a preferential payment under a statute which conferred such jurisdiction upon the Article III district court. The Court wrote:

> "Where a suit by the trustee is plenary in character, as are those authorized by § 60(b), both parties to it are entitled to claim the benefits of the procedure in a plenary suit, not available in the summary method of procedure which, under the provisions of the Bankruptcy Act, is employed by the referee. A denial of those benefits would be in effect a denial of the right to a plenary suit, to which both parties are entitled under § 60(b). *But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived* [citations omitted], *and, being waived, that the referee is without the power given to courts of bankruptcy to decide the issues.*" (286 U.S. at 266-67; emphasis added.)

Moreover, in promulgating the Rules of Bankruptcy Procedure in 1973, this Court again recognized that bankruptcy

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[17] *See also, Cline* v. *Kaplan*, 323 U.S. 97, 99 (1944); *Phelps* v. *United States*, 421 U.S. 330, 336 n.6 (1975); *Page* v. *Arkansas Gas Corp.*, 286 U.S. 269, 271-72 (1932); 1977 House Report at 44 (*quoting* Report of the Commission on the Bankruptcy Laws of the United States 88 (1973)); D. Cowans, 2 Bankruptcy Law & Practice § 576 at 218-19 (1978).

courts have jurisdiction by consent of the parties over cases relating to the debtor. Rule 102 provides for automatic reference of bankruptcy cases to referees (defined as bankruptcy judges in Rule 901). And Rule 915(a) provides:

> ". . . a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served."

If this Court holds that the jurisdiction in § 1471(c) is unconstitutional, such a holding would cast doubt upon all of the cases decided under prior law, where jurisdiction was founded on consent. Certainly, there is a strong presumption against such a result. *Life & Casualty Co.* v. *McCray*, 291 U.S. 566, 572 (1934) ("The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years."); *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32 (1963); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

Indeed, this Court has recognized a duty to inquire into the existence of subject-matter jurisdiction *sua sponte*. *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Mansfield, C.&L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). Thus, the holding in *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932) (that a bankruptcy referee had jurisdiction by consent over a plenary action) should compel a holding by this Court that the grant of jurisdiction to the present bankruptcy court is constitutional.

III.

Article III Concerns Are Protected Under the Reform Act.

The fundamental concern of the framers of the Constitution which was expressed in the tenure and salary provisions of Article III was that the independence of the judiciary be protected against undue influence from the executive and legislative branches of the government. As this Court has written:

> "The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review [Art. III, § 1], forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States.
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> * * *
>
> Thus, in The Federalist, No. 78, Hamilton said—'The complete independence of the courts of justice is peculiarly essential in a limited Constitution.' And, in No. 79—'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*'" (*O'Donoghue* v. *United States*, 289 U.S. 516, 531 (1933); emphasis in original.)

A comparison of the tenure and salary provisions of Article III judges and bankruptcy judges reveals that the Article III concerns of the framers of the Constitution are fully protected by the provisions of the Reform Act. First, Article III judges are appointed by the President, with the

advice and consent of the Senate. 28 U.S.C. §§ 44, 133. Similarly, bankruptcy judges are appointed by the President, with the advice and consent of the Senate. 28 U.S.C. § 152.

Article III judges hold office "during good behavior." 28 U.S.C. §§ 44, 134. Bankruptcy judges are appointed for a term of 14 years. 28 U.S.C. § 153(a). However, judges are usually appointed late in their legal careers. Thus, as a practical matter, an appointment of 14 years is often equivalent to life tenure. (The average tenure of all sitting Article III judges, including senior judges, is 12.1 years. *See* memorandum of R. Glenn Johnson to Joseph Bobek, Assistant Chief, Financial Management Division of the Administrative Office of the United States Courts, dated May 28, 1981, annexed hereto as Appendix A.)

Article III judges can be removed from their positions by Congress, pursuant to its impeachment powers. U.S. Const., Art. III, § 1; Art. I, § 2, cl. 5 and § 3, cls. 6 and 7. Bankruptcy judges, on the other hand, can be removed only by other judges. They are subject to removal "for incompetency, misconduct, neglect of duty, or physical or mental disability" by the judicial council of the circuit in which they serve. 28 U.S.C. § 153(b). Hence, in this respect, the Reform Act can be said to be more protective of the independence of judges from the legislature than is the Constitution.

The salaries of Article III judges are not subject to reduction during their continuance in office. U.S. Const., Art. III, § 1. While Congress can reduce the salaries of all bankruptcy judges, history suggests that such an event is unlikely.[18] Moreover, it can hardly be said that Article III

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[18] It is clear that Congress cannot seek to exert pressure on bankruptcy judges by reducing the salaries of only some of them. *See United States* v. *Lovett*, 328 U.S. 303, 315-16 (1946).

judges are insulated from financial concerns. Indeed, the Chief Justice has rightly called compensation the Federal judiciary's "most pressing issue." Report of the Commission on Executive, Legislative and Judicial Salaries 42 (1980) [hereafter Salaries Report]. While the legislature and the executive cannot reduce the wages of Article III judges, they certainly have the ability effectively to reduce wages by failing to compensate for inflation. *See Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978); *cf., United States* v. *Will,* 449 U.S. 200, 219-20 (1980).

In short, in a time when members of the federal judiciary are forced to resign from the bench because of inadequate compensation, *see* Salaries Report at 28, it seems senseless to invalidate the jurisdiction of a court because of the remote possibility that its judges might have their salaries reduced at some future time.

CONCLUSION

For the reasons set forth above, the holding of the district court should be reversed and this Court should hold that 28 U.S.C. § 1471(c) is a valid enactment under Congress' Article I powers.

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New York, New York

Respectfully submitted,

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